UNITED STATES FOREST SERVICE, ALASKA REGION

IBLA 92-4 Decided November 18, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application J-010843.

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

   As used in 43 CFR 4.401(a), which provides a grace period for documents untimely filed, a document is "transmitted or probably transmitted" when custody and control of the document is surrendered to an agency charged with delivering the document to the proper office.

APPEARANCES: Robert A. Maynard, Esq., Senior Counsel, Office of the General Counsel, United States Department of Agriculture, Juneau, Alaska, for the Forest Service; Carlene M. Faithful, Esq., Office of the Regional Solicitor, United States Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated August 13, 1991, the Alaska State Office, Bureau of Land Management (BLM), approved Native allotment application J-010843, filed on August 12, 1957, by Sergius P. Williams. 1/ This allotment application had been rejected on August 22, 1961, because the applicant had not responded to requests to more clearly delineate the area being sought. It was reinstated on July 26, 1990, pursuant to the provisions of section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1988).

1/ The record discloses that Williams had originally made an application for a Native allotment on Mar. 17, 1916, seeking 3 acres of land on Baranoff Island, serialized as Juneau 02891. Subsequent to an unfavorable field report which disclosed an abandoned shack and a small cultivated strip but concluded that the applicant had not complied with the applicable regulations concerning residence, cultivation, and improvements, the Acting Commissioner of the General Land Office issued a decision dated Nov. 10, 1922, holding the allotment for rejection. It was finally rejected on Mar. 31, 1923, and the case was closed.

In its decision approving the allotment application, the State Office determined that Williams had complied with the provisions of the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications by section 18(a)of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988)), and approved the allotment subject only to a reservation for ditches and canals under the Act of August 30, 1890, 43 U.S.C. § 945 (1988). The record shows that a copy of this decision was sent to the Juneau Regional Office of the Forest Service, Department of Agriculture, where it was received on August 19, 1991.

By letter dated September 18, 1991, the Director, Lands, Minerals, and Watershed Management, Alaska Region, Forest Service, submitted a notice of appeal of the decision approving the allotment, requesting the reservation of a 66-foot easement for a road which the Forest Service had constructed in 1975 and which bisected the allotment. This notice of appeal was received by BLM on September 23, 1991.

On November 20, 1991, counsel for BLM, pointing out that the envelope containing the Forest Service's notice of appeal bore a postmark of September 19, 1991, submitted a motion to dismiss the appeal as untimely filed under the applicable regulation, 43 CFR 4.411(a). Thereafter, counsel for the Forest Service filed a statement in opposition to this motion. For the reasons set forth below, we conclude that the instant appeal must
be dismissed as untimely.

The applicable regulation, 43 CFR 4.411(a), provides, in relevant part, that:

> A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

Filing, in the context of this regulation, means received in the proper office. See, e.g., San Juan Coal Co., 83 IBLA 379 (1984); State of Alaska, 70 IBLA 369 (1983). Thus, since the Forest Service received the decision of the State Office on August 19, 1991, its notice of appeal would have had to have been received by BLM on September 18, 1991, in order for it to be timely. Since the notice of appeal was not received until September 23, 1991, it was clearly untimely.

The regulations further provide, however, that a late filing of a notice of appeal will be waived

> [If] the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed.

43 CFR 4.401(a). Appellant argues that, under this provision, the delay in filing should be waived because, in point of fact, the notice of appeal was transmitted prior to the end of the period in which it was required to be filed.

Appellant admits that the notice of appeal in question was not delivered to the Post Office until September 19, 1991, a date which is consistent with the postmark on the envelope and is 1 day after the running of the period in which the notice of appeal was required to be filed. Appellant argues, however, that the notice of appeal was, in fact, signed by the Director, Lands, Minerals, and Watershed Management, on September 18, 1991, and was transmitted by him to the Forest Service staff clerk unit responsible for mailing letters on that date. Appellant continues:

> The Forest Service submits accordingly that the Forest Service letter was "transmitted to" the BLM office that issued the Decision Notice that is being appealed, on September 18, 1991. The author and the transmitter of the letter conveyed the letter to the employees responsible for actually mailing the letter on that date. The apparent fact that a clerical unit did not further convey the letter from its outgoing correspondence file to the Postal Service until one day later should not disqualify a federal agency appellant acting in good faith from the grace period provided for under 43 CFR 4.401(a).

(Memorandum in Opposition to Motion to Dismiss Appeal at 2-3). We cannot agree.

The "grace period" regulation dates from 1958 (see 23 FR 1930 (Mar. 22, 1958), 43 CFR 221.92 (1959)), and its meaning and scope have been fleshed out in innumerable decisions. Transmittal, under this regulation, occurs only when the document in question is delivered to the Post Office or deposited in a mail box. 2/ See, e.g., A. Anton Frederickson, A-30793 (Nov. 28, 1967); John W. Monzel, A-28817 (Aug. 31, 1961). Appellant, in essence, seeks to have this Board hold that the mere preparation of a notice of appeal constitutes transmittal of that document. That is not the standard. Initiation of internal procedures to file a notice of appeal does not constitute transmission of the notice of appeal within the meaning of 43 CFR 4.401(a). It is the relinquishment of possession and control to an agency charged with the delivery of the document which determines when a document is transmitted. Thus, the notice of appeal in the instant case was not "transmitted" within the meaning of the applicable regulation, until control over the document was passed to the Postal authorities. 3/

2/ Admittedly, given the rise of other, independent delivery services, transmittal would also be deemed to have occurred when the document in question was deposited in their possession.

3/ The suggestion of the Forest Service that a looser standard should be applicable "when the Appellant is a federal agency organization like the Forest Service, where mail responsibilities reside in clerical units separate from the officials transmitting correspondence" (Memorandum at 4), cannot be credited. The principle espoused in Monturah Co., 10 IBLA 347

Various decisions have noted that the postmark is presumed to be the date of mailing and thus the date of transmittal. John W. Monzel, supra. This presumption may, of course, be overcome by evidence showing the document was deposited in the mails within the period in which it was required to be filed. A. Anton Frederickson, supra. The evidence submitted with this appeal, however, far from supporting a finding that the document was transmitted within the time period, clearly and conclusively establishes that the document in question was not timely transmitted.

Appellant has submitted the log of outgoing correspondence which explicitly shows that the document in question was not mailed until September 19, 1991, one day late. Thus, unlike other cases where the Department has, in effect, given appellants the benefit of the doubt with respect to a determination that a document was "probably transmitted" within the relevant time period, it is an unassailable fact that, in this case, the document in question was not transmitted within the time period in which the notice of appeal was required to be filed.

The consequence attendant to the late filing of a notice of appeal is clear. Since the timely filing of a notice of appeal is necessary to establish the jurisdiction of the Board over the appeal, the late filing of a notice of appeal deprives the Board of jurisdiction over the matter appealed and necessitates dismissal of the appeal. See, e.g., Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (1960); Thelma M. Eckert, 120 IBLA 367 (1991); Ilean Landis, 49 IBLA 59 (1980). Thus, in the instant case, since the notice of appeal was untimely filed and it cannot be said that it was transmitted or probably transmitted within the period in which filing was required, the Board has no choice but to dismiss the appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

fn. 3 (continued)
(1973), in the context of timely payment of annual rentals for oil and gas leases, seems equally applicable herein:

"Companies are not held to a higher standard of diligence by the mere fact of their corporate structure. But by the same token, they cannot hide behind the bulk and complexity of their organizations, so as to make 'justifiable' for them actions which would not be held justifiable for individual lessees."

Id. at 348.

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